IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.01.2007

Coram:

The Honourable Mr.Justice J.A.K.SAMPATH KUMAR

A.S.No.805 of 1991

1.Dayalan
2.Gowri .. Appellants/Defendants 2 and 3

Vs.

1.Mallika
2.Lakshmikanthammal ..Respondents/Plaintiff & 1st Defendant

The Appeal is filed Under Section 96 of the Civil Procedure Code against the Judgment and decree dated 23.09.1991 made in O.S.No.39 of 1988, on the file of Sub-Court, Tindivanam.

For Appellants : Mr.A.Kumarasamy

For Respondents
For R-1 : Mr.R.Subramanian,
M/s.Hema Sampath and Juliana Pinto
For R-2 : No Appearance

....

JUDGMENT

This appeal is filed against the Judgment dated 23.09.1991 in O.S.No.39 of 1988 on the file of Sub Court, Tindivanam in and by which the learned Subordinate Judge after analysing the records found that the the plaintiff is entitled for suit claim and accordingly decreed the suit. The defendants 2 and 3 are appellants herein.

2. For convenience, the parties are referred as arrayed in the Original Suit. The brief facts of the case are as follows:-

2(1) The suit property belongs to the first defendant. The first defendant proposed to sell the suit property to the plaintiff. The plaintiff also agreed to purchase the suit property from the first defendant. In this connection, the first defendant and the plaintiff entered into an agreement on 17.7.1987. The sale price was fixed at Rs.30,500/- (Rupees thirty thousand and five hundred only).

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

On the date of agreement itself, the plaintiff paid a sum of Rs.4,000/- (Rupees four thousand only) as advance to the first defendant. The balance amount was to be paid by the plaintiff to the first defendant within one year from the date of agreement and the plaintiff has to get the sale deed executed by the first defendant at the cost of the plaintiff. In case, the plaintiff fails to get the sale deed executed by the first defendant as stated above she has to forego the sum of Rs.4000/- (Rupees four thousand only) which she has paid as advance on 17.07.1987. If the first defendant failed to execute the sale deed as aforesaid, the plaintiff is entitled to get the sale deed executed as per law. The above agreement was reduced into writing and a deed of agreement was executed on 17.07.1987. The first defendant delivered the suit property to the plaintiff on the date of agreement. Since then the plaintiff has been in possession and enjoyment of the suit property.

2(2) Apart from the payment of Rs.4000/- (Rupees four thousand only) which the plaintiff has paid as advance to the first defendant the plaintiff paid a sum of Rs.3500/- (Rupees three thousand five hundred only) on 21.12.1987 and a sum of Rs.20,000/- (Rupees twenty thousand only) on 07.01.1988 to the first defendant towards the sale price. The above said payments have been endorsed in the deed of agreement and the first defendant has signed in the above endorsements. Thus, a total sum of Rs.27,500/- (Rupees twenty seven thousand five hundred only) has been paid by the plaintiff to the first defendant towards the sale price. Thus a sum of Rs.3000/- (Rupees three thousand only) only remain to be paid by the plaintiff to the first defendant. The plaintiff has been always ready and willing to pay the said sum of Rs.3000/- (Rupees three thousand only) to the first defendant and get the sale deed executed at the plaintiff's cost. The plaintiff has demanded the first defendant several times to receive the balance amount of Rs.3000/- (Rupees three thousand only) and execute the sale deed at her cost. On 01.02.1988 the plaintiff finally demanded so. But the first defendant has not come forward to do so.

2(3) The defendants 2 and 3 are fully aware of the suit agreement entered into between the plaintiff and the first defendant. In fact, the entire village people know about the suit agreement. But all the three defendants have colluded together and they want to cheat the plaintiff by trying to get a deed of sale in the name of either the second defendant or the third defendant. After having executed the suit agreement dated 17.7.1987 in favour of the plaintiff, the first defendant has no right to enter into an agreement of any kind with the defendants 2 and 3 or any other persons. Hence, even if all the three defendants have colluded together and brought any sale deed or other deed in favour of either the second defendant or the third defendant, the same will not bind the plaintiff. But the defendants 2 and 3 are trying illegally to get a sale deed from the first

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

defendant in respect of the suit property. They have no right to do so. The first defendant also has no right to execute any sale deed in favour of the defendants 2 and 3 in contravention of the sale agreement which she had executed in favour of the plaintiff. Hence the suit.

3. The Written statement filed by the first defendant reads as follows:

The suit document namely, agreement of sale is not enforceable in law. There is no sale agreement entered into between the plaintiff and the first defendant. The defendant came to know that during the month of September, 1988 the plaintiff purchased the suit property from one J. Gopalakrishnan. The suit document is forged one. In fact, the suit property was sold by the first defendant to the third defendant and hence the suit is liable to be dismissed.

4. The Written statement filed by the second defendant and adopted by the third defendant reads as follows:

4.1. The suit property was purchased by the second defendant for valid consideration from the first defendant. The defendants were not aware of the alleged suit agreement entered into between the plaintiff and the first defendant and the same is not binding on the defendants 2 and 3 as they are, bonafide purchaser of the suit property for valid consideration. In fact, the defendant in pursuance of the sale deed in respect of the suit property taken possession of the suit property made improvement over the same and also deepening the Well and wherein the defendants cultivating paddy. Therefore, the suit is liable to be dismissed.

5. Plaintiff was examined as P.W.1. Perumal, Vinayagam, Chinnayya Naidu and M.R.Reddiyar were examined as P.W.2 to P.W.5. Ex.A1 to A7 were marked on the side of the plaintiff to prove the suit claim. The first and second defendants were examined as D.W.1 and D.W.2. Iyyasamy and Thirugnanasammandam were examined as D.W.3 and D.W.4. Exs.B1 to B6 were marked on the side of the defendants to disprove the suit claim of the plaintiff.

6. The lower Court after analysing the evidence in depth held that the plaintiff is entitled to the suit claim and accordingly decreed the suit. The present appeal is filed by the second and third defendants against such finding.

7. Heard Mr.A.K.Kumarasamy, learned counsel appeared for the Appellants/defendants 2 and 3 and Mr.R.Subramanian and M/s.Hema Sampath and Juliana Pinto, learned counsel appeared for the Respondent/Plaintiff. No one appeared on the side of the respondent / first defendant.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

8. Upon hearing the arguments of the learned counsel for the appellants and respondents, the points for consideration are

(i) Whether the suit agreement namely, Ex.A1 has got legal sanction to sustain the suit claim ?

(ii) Whether the plaintiff proved the entries of Ex.A2 and A3 in Ex.A1 to sustain the suit claim ?

(iii) Whether the suit agreement is forged one as stated by the first defendant ?

(iv) Whether the first defendant has got any legal right to execute a sale deed in respect of the suit property in favour of the plaintiff as the right to the suit property was transferred in favour of the plaintiff in pursuance of sale transaction between the plaintiff and one K.Gopalakrishnan, one of the sons of the first defendant ?

(v) Whether the appellants have any legal grievance in respect of the suit transaction under Section 54 of Transfer of Property Act as the sale deed in their favour is not enforceable in law ?

(vi) Whether the plaintiffs are in possession of the suit property in pursuance of the agreement of sale ?

9. Point No.1

Plaintiff relied on the suit agreement to sustain the suit claim whereas the defendants confronted the genuineness of the suit agreement as the same is forged one and prayed to dismiss the suit. With the above background, let me see the document on hand to find out whether the said document has got legal sanction.

10. According to the plaintiff he made several payments to the defendants and the same has been endorsed on the backside of the first page. The endorsement is marked as Exs.A2 and A3. On a perusal of Exs.A1, A2 and A3, I find that the alleged agreement was signed in Telugu. With regard to Exs.A2 and A3, the plaintiff in his evidence as P.W.1 has stated that he was not aware of the same. He was also not having sufficient fund to perform his part of contract as per agreement. The evidence of P.W.1 regarding this aspect reads as follows:

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

"வா.சா.ஆ.2–ல் 2–ஆம் பக்கம் எது என்று எனக்கு தெரியாது. நான் பத்திரத்தில் தான் எழுதி கையெழுத்து போட்டு இருக்கிறேன். பத்திரத்தில் உள்ள வாசகங்கள் எனக்கு தெரியாது. வா.சா.ஆ.1–ல் ஒரே பக்கத்தில் தான் கையெபத்து போட்டேன். இரண்டாவது தடவை ரூ.3500/–ய,,ம், பிறகு ரூ.20,000/– தொகை கொடுத்தேன். வா.சா.ஆ.3 வரவை பொருமாள் தான் எழுதினார் என்றால் தெரியாது. என் கணவரை தான் கேட்க வேண்டும்.....

நான் இதே சொத்தை ஒன்றாம் பிரதிவாதியின் மகன் கோபாலகிருஉட்டிணனிடம் 1988–ல் கிரயம் வாங்கி இருக்கிறேன் என்றால் சரி அந்த கிரயப்பத்திரம் என்னிடம் தான் இருக்கிறது. அதில் ஒன்றாம் பிரதிவாதி சோந்து எழுதி தரவில்லை. என்றால் சரி. வா.சா.ஆ.1–ஐ பற்றி எனக்கும் சுப்ரமணியத்திற்கும் மட்டும் தெரியும். ஆனால் அவரிடம் நான் கையெழுத்து வாங்கவில்லை, வா.சா.ஆ.2, வா.சா.ஆ.3 காலத்தில் என்னிடம் பூராத்தொகைய,,ம் இல்லை என்றால் சரி மீதித்தொகை என்னிடம் தயாரக உள்ளது. ஆனால் கோர்ட்டில் கட்டவில்லை.....

தாவா சொத்து கோபலகிருஉட்டிணனுக்கு சோந்து விட்டதால் அவரிடம் கிரயம் வாங்கினேன்."

Further on a perusal of Ex.A1, it is apparent on the face of the record the description of the property has been added after execution of the document namely Ex.A1. P.W.2 and P.W.4 supports this aspect. The evidence of P.W.2 regarding this aspect reads as follows:

"அந்த பத்திரத்தில் சொத்து விவரத்தை என் கையெழுத்து போட்ட பிறகு தான் எழுதியது என்றால் சரி"

The evidence of P.W.4 regarding this aspect reads as follows:

"சொத்து விவரத்தை வா.சா.ஆ.1 எழுதிய பிறகுதான் எழுதியது.."

Moreover, the description of the property has been written in different ink. More so, the manner of writing of description of the property is not in the way, written in the previous lines. The characteristics of the letters of the entire documents excluding description of the property are one and the same written in big letters whereas the description of the property alone written in a different manner with small letters. Since the description of the property has been interpolated subsequent to the execution of documents, the same has no legal sanction, unless it is attested by the executant, the infirmities found in the said document was not explained which leads to drawing an adverse inference against the

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

genuineness of the documents. Further, such interpolation without attestation lose its genuine character. In fact, the defendant examined handwriting an expert and proved that signatures found in Ex.A1, A2 and A3 were not belong to the first defendant. The lower court rejected the evidence of the handwriting expert only on the ground that the handwriting expert who was examined as D.W.3 was not aware of telugu language. But the handwriting expert compares genuine signatures with the disputed signatures. With reference to the characteristics of the letter for which the language of the document need not be known to the expert. Only on the basis of the characteristics of the letters and not on the basis of the language in which the document has been writtened, the expert has given his opinion. Admittedly, the disputed signatures are in Telugu language whereas the lower court suo motto perused the signatures which is in Telugu and held that they are genuine without assigning any reason as to how they are genuine when the document is signed in Telugu. Since because the handwriting expert does not know Telugu language, it does not mean that he is not a competent person to examine the document in Telugu and give an expert opinion. The handwriting expert who was examined as D.W.3 is a Government Servant working in Tamil Nadu Forensic Science Department. He rendered an expert opinion to the effect that the signatures found in Ex.A1, A2 and A3 are not that of the first defendant only on the basis of characteristics of the letters. An attempt has been made by the plaintiff challenging the expert opinion at the time of cross examination whereas D.W.3 has given acceptable reasons for coming to a conclusion that the disputed signatures are not that of the signatures of the first defendant even at the time of cross examination. The evidence of D.W.3 in this regard is believable, acceptable of trustworthy. The findings of the lower court in rejecting the evidence of D.W.3 does not have any sound reason. Hence, the findings of the lower court in rejecting the evidence of D.W.3 is not correct and the same is set aside. Looking in any angle, I am satisfied that Ex.A1, A2, A3 are not genuine and the same has no legal sanction at all as the interpolation subsequent to the execution was not attested by the person who said to have executed the said document. The lower court failed to look into this aspect in detail and came to a wrong conclusion that documents namely Ex.A1, A2 and A3 are the genuine, resulting in miscarriage of justice. In such a view of the fact, the findings of the lower court in this regard is not sustainable and the same is set aside. Hence, this point is answered against the plaintiff.

11. Point Nos.2 and 3 :

In view of the conclusion arrived in point No.1 these points are answered against the plaintiff.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

12. Point No.4 :

Even according to the plaintiff in pursuance of the sale deed in her favour executed by one of the sons of the first defendant in respect of the suit property as she claims that the said person is absolute owner of the same, the question of directing the first defendant to execute another sale deed in respect of the suit property in favour of the plaintiff does not arise at all. The evidence of P.W.1 in this regard reads as follows:

"நான் இதே சொத்தை ஒன்றாவது பிரதிவாதியின் மகன் கோபாலகிருஷ்ணனிடம் இருந்து 1988–ல் கிரயம் வாங்கி இருக்கிறேன் என்றால் சரி. அந்த கிரயப்பத்திரம் என்னிடம் தான் இருக்கிறது. தாவா சொத்து கோபாலகிருஷ்ணனுக்கு சோந்து விட்டதால் அவரிடம் கிரயம் வாங்கினேன்."

In such view of the fact, I am satisfied that the plaintiff cannot seek relief against the first defendant to execute another sale deed in respect of the suit property, in her favour. Hence, the point is answered against the plaintiff.

13. Point No.5 :

Section 54 of Transfer of Property Act reads as follows:

> ""Sale" defined – "Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.
>
> Sale how made – Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards, or in the case of a reversion or other intangible thing, can be made only by a registered instrument.
>
> In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property.
>
> Delivery of tangible immovable property takes place when the seller places the buyer, or such person as he directs, in possession of the property.
>
> Contract for sale – A contract for the sale of immovable property is a contract that a sale of such property shall take place on terms settled between

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

the parties.

It does not, of itself, create any interest in or charge on such property."

Now, let me deal with the rival claim to answer for this section. It is a specific case of the appellants/defendants that they inducted into possession of the suit property in pursuance of the sale deed executed by the first defendant in their favour which is marked as Ex.B1 and Ex.B2. It is a specific case of the appellants/defendants that they are in possession of the suit property in pursuance of the sale deed in dispute. Whereas the plaintiff would contend that they are in possession of the suit property in pursuance of the sale agreement in their favour. The person who is in possession of the suit property is not a matter to be decided in this issue. The only point for consideration is whether the appellants/ defendants has got any legal right to sustain their claim by setting the Law into motion in pursuance of Ex.B1 and B2. It is also the case of the appellants / defendants that they are in possession of the suit property in pursuance of the Ex.B1 and B2. In such view of the fact, I am satisfied that the appellants / defendants have got genuine reason to sustain their claim in pursuance of the Ex.B1 and B2 under Section 54 of this act. Hence, I answered the point in favour of the appellants / defendants.

14. Point No.6 :

The plaintiff contended that the suit property is in her possession in pursuance of the sale agreement whereas the defendants would contend that the suit property is not in possession of the plaintiff and the same is very much in the possession of the defendants.

15. To sustain her claim, the plaintiff contended that she alone paying the property tax in the name of the first defendant. The evidence of P.W.1 in this regard reads as follows:

"சொத்தை நான் தான் பயிரிட்டு வருகிறேன். தீர்வை நான் ஒன்றாம் பிரதிவாதி மீது செலுத்தி வருகிறேன்."

If the evidence of P.W.1 is true, she ought to have filed the kist receipt and proved that she has been paying kist in respect of the suit property on behalf of the first defendant. If the contention of the plaintiff is true, she must be in possession of the kist receipt. In the absence of production of the kist receipt an adverse inference is to be drawn against the plaintiff under Section 114 of Indian Evidence Act.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

16. The defendants in their written statement specifically stated that they have improved the suit property apart from deepening the Well and cultivating paddy over the same. The plaintiff has not filed any reply confronting the claim of the defendants in the written statement. One thing is admitted by the plaintiff i.e. Suit property is now stands in the name of the first defendant, that is the reason why the kist receipt has been issued in the name of the first defendant which cannot be denied by the plaintiff. In the absence of production of the alleged kist receipt by the plaintiff, I am constrained to hold that the plaintiff is not paying kist for the suit property on behalf of the first defendant. Hence, I am satisfied that the plaintiff has not proved her possession of the suit property in pursuance of the sale agreement as contended by her. If the plaintiff is really in possession and enjoyment of the suit property in pursuance of the said sale agreement, the above finding would not in any way affect the plaintiff in view of the fact that she has been in possession of the same over the past twenty years without any interruption. It is also true that, though the defendants claim right over the suit property as per Ex.B1 and B2 if the defendants are not in possession of the suit property, they cannot now set the Law into motion, after a lapse of twenty years, for the possession of the suit property. Both the plaintiffs and defendants have not established their respective claim with reference to the possession of the suit property. If the defendants are really in possession of the suit property, the plaintiff cannot claim possession of the same as her case is contrary to the same.

17. If really, the plaintiffs are in possession of the suit property the plaintiff may not be prejudiced even in case of rejecting her claim, as the defendants have not set the Law into motion within the period of limited time for possession of the suit property in pursuance of Ex.B1 and B2. Hence, this point is answered accordingly.

18. The lower court without dealing the issues on hand in detail came to the conclusion that the plaintiff is entitled to the suit claim and accordingly decreed the suit. Such finding is wrong, apparent on the face of the materials on record and therefore findings of the lower court in decreeing the suit is set aside.

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/

19. In result, appeal is allowed. The judgment and decree of the lower court in O.S. No.39 of 1988 on the file of Subordinate Judge, Tindivanam in decreeing the suit claim is set aside. The suit is dismissed. The parties have to bear their own costs.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

vaan

To

1.The Subordinate Judge,
Tindivanam. (with records if any)

2.The Record Keeper, VR Section,
High Court, Madras.

+1cc to Mr.A.K.Kumarasamy, Advocate Sr 3273
+1cc to Mrs. Hema Sampath, Advocate SR 3484

NG (CO)
km/15.2.

A.S.No.805 of 1991

WEB COPY

https://hcservices.ecourts.gov.in/hcservices/